personal obligation to interpose a right of action which his firm has against the plaintiff, depends upon his right to sue upon the firm claim.[24]

Where, however, all members of the partnership are parties to the original suit, either as plaintiffs or defendants, the only obstacle to the pleading of counterclaims, under the liberal practice established by the new Federal Rules, would seem to be the practical considerations of trial convenience and possible prejudice to the parties. Rule 13(a) provides that any cause of action arising out of the transaction which forms the basis of the plaintiff's complaint must be pleaded by the defendant;[25] since a counterclaim offered under this provision will usually raise issues closely connected with those presented by the complaint, the avoidance of duplication which would result from separate trials would seem to outweigh any disadvantages the parties might suffer from the joinder. On the other hand, Rule 13(b) permits the defendant to counterclaim any other cause of action which he has against an opposing party.[26] Since a counterclaim offered under this provision may involve matters entirely foreign to the complaint, presentment of complicated and unrelated issues to the jury may seriously prejudice parties not otherwise concerned with the defendant's cause of action. This would seem to present a proper situation for the exercise of the court's power of severance under Rule 42(b).[27] While the report of the opinion in the instant case fails to disclose the substantive nature of the counterclaims pleaded, the court evidently felt that the issues which they raised were sufficiently connected with those presented by the complaint to justify a settlement of all claims in one trial.

Procedure—Federal Venue Statute—Appointment of Agent for Service of Process Pursuant to State Law as Waiver of Improper Venue—[Federal].—The complainants, stockholders in United Shipyards Incorporated, brought suit against that company, certain of its officers, and the Bethlehem Shipbuilding Corporation. Complainants were citizens of New Jersey, Bethlehem was a Delaware corporation, and all other defendants were residents of New York. Suit was brought in the District Court for the Southern District of New York where Bethlehem had its main executive offices and where it had appointed an agent for service of process to fulfill the requirements of the New York corporation law.[1] Bethlehem moved to quash the service of process on the ground of non-compliance with Section 51 of the Judicial Code[2] which provides: ". . . . where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of residence of either the plaintiff or the defendant. . . . ." On certiorari from an affirmance[3] of an order dis-

[24] McGuire v. Lamb, 2 Idaho 378, 17 Pac. 749 (1888); Hallam v. Henkin, 31 S.D. 637, 141 N.W. 784 (1913); Heinrich v. Kirby, 64 Mont. 1, 208 Pac. 897 (1922).

[25] Note 19 supra. [26] Note 20 supra.

[27] Rule 42(b): "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim. . . . ."

[1] N.Y.L. 1892, c. 687, pp. 1805–6; substantially reenacted in N.Y. Gen'l Corp. Law § 210.

[2] 49 Stat. 1213 (1936), 28 U.S.C.A. § 112 (Supp. 1939). For comment on the effect of the instant case on construction of other federal venue statutes (listed in 3 Moore, Federal Practice § 105 (1938)) see Federal Venue Requirements for Foreign Corporations, 49 Yale L. J. 724, 726, 729 (1940).

[3] Neirbo Co. v. Bethlehem Shipbuilding Corp., 103 F. (2d) 765 (C.C.A. 2d 1939).

missing the suit as to Bethlehem, *held*, the designation by a foreign corporation pursuant to a state law of an agent on whom process may be served amounts to a "consent to be sued" in that state and a waiver of the venue privileges of the federal statute. Reversed and remanded. *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*[4]

Under the first Judiciary Act[5] suit based on diversity of citizenship might be brought in the district of residence of either the plaintiff or defendant, or in the district in which service of process was had upon the defendant. By judicial decision a defendant also became subject to suit in any district in which he had consented to be sued.[6] When states enacted laws requiring citizens of other states and foreign corporations doing business within their borders to appoint agents for service of process,[7] the question arose whether compliance with such a statute subjected a non-resident to suit in the federal court of the district of residence of the agent which is appointed.

In *Ex parte Schollenberger*[8] the United State Supreme Court held that service upon an agent actually appointed pursuant to such a state law gave the federal court personal jurisdiction over a corporate defendant and that by consenting to service of process within the state the corporation had "consented to be found" within the district for the purposes of federal venue. After the deletion of the clause of the Judiciary Act which had permitted suits in any district in which the defendant could be found and served,[9] the Supreme Court held upon several occasions that a corporation could not be sued in a state in which it was doing business and had appointed an agent for service of process.[10] The pressure of business on overburdened federal courts was probably one reason for these decisions.[11]

At the present time, the volume of federal litigation has been much reduced.[12] It is therefore practical to permit a greater number of litigants to take advantage of the procedure and supposed greater competence of federal tribunals.[13] The Supreme

[4] 60 S.Ct. 153 (1939) followed in Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 60 S.Ct. 215 (1939).

[5] 1 Stat. 79 (1789).

[6] Ex parte Schollenberger, 96 U.S. 369 (1877); Central Trust Co. v. McGeorge, 151 U.S. 129 (1894); Interior Construction Co. v. Gibney, 160 U.S. 217 (1895); Commercial Ins. Co. v. Stone Co., 278 U.S. 177 (1929); cf. United States v. Hvoslef, 237 U.S. 1 (1915).

[7] Henderson, The Position of Foreign Corporations in American Constitutional Law, c. 5 (1918).

[8] 96 U.S. 369 (1877). [9] 24 Stat. 552 (1887); 25 Stat. 434 (1888).

[10] Shaw v. Quincy Mining Co., 145 U.S. 444 (1892); Southern Pacific Co. v. Denton, 146 U.S. 202 (1892); In re Keasbey & Mattison Co., 160 U.S. 221 (1895). These cases were followed in the lower court decisions cited in the opinion of the principal case, 60 S. Ct. 157, note 16. The Schollenberger case continued to be good law insofar as it held that service of process on an agent of corporation appointed pursuant to state law gave a federal district court jurisdiction over the person of the defendant.

[11] In 1890 there were 1816 cases pending before the Supreme Court and 54,194 cases pending before the lower federal courts. Frankfurter and Landis, The Business of the Supreme Court 60 (1927).

[12] Frankfurter and Landis, op. cit. supra note 11, at cc. 2, 3, 5–7. Moreover the overruling of Swift v. Tyson, 16 Pet. (U.S.) 1 (1842) by Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) may further decrease the business of the federal judiciary.

[13] See generally 31 Mich. L. Rev. 60–5 (1932); 38 Col. L. Rev. 1472–84 (1938).

Court's decision in the instant case marks a first step in the extension of such permission. No longer will a corporation of one state doing business in a second state and having officers who are residents of the state in which it is doing business have any real option to bar a resident of a third state from suing it and its officers in a federal court.[14] Nor will a corporation organized in one state and doing business in a second state, have discriminatory advantages in determining the place of trial when it is suing or being sued by a resident of the second state.[15] On the contrary the present decision will have the opposite effect of discriminating against a corporation organized in one state and doing business in another; non-residents of the state in which the corporation is doing business will have the unrestricted right to sue the corporation in the federal courts of the state in which it is doing business; conversely the corporation will not be able to sue such non-residents in the federal courts of the state in which it is doing business unless they consent to the suit.

The Supreme Court reached the result in the present case on the theory that the corporation by doing business in New York and appointing an agent there for service of process had "consented to be sued" in New York. As applied here the consent theory is subject to all the theoretical objections which caused its abandonment as a rationale in suits against foreign corporations in state courts.[16] In the principal case the corporation had actually appointed an agent on whom process could be served and had thereby given some kind of consent; but the problem will arise whether a corporation will be deemed to have consented to be sued in the federal district courts of a state in which it is doing business if the corporation statute of such state merely provides that service upon the secretary of state shall bind foreign corporations doing business within the state. Moreover, the New York courts have interpreted the designation of an agent as a "true contract" permitting suit in New York;[17] should a state court assert that a corporation by appointing an agent for service of process submits to state regulation, but does not "contract" to appoint an agent for service,[18] the basis of the present decision might well be deemed inapplicable. The inability of the state to exclude cor-

[14] Compare the situation in Platt v. Massachusetts Real Estate Co., 103 Fed. 705 (C.C. Mass. 1900).

[15] Under the former rule a corporation organized in State I and doing business in State II might sue a resident of State II in either the state or federal courts of State II; and if it were sued by a resident of State II in the state courts of State II, it might at its option remove to the federal courts of State II. Similarly the resident of State II might sue the corporation in either the state or federal courts of State I, and if sued by the corporation in State I might remove to the federal courts of State I. Since the convenience of both the resident of State II and the corporation organized in State I and doing business in State II would generally be best served by suit in State II, most suits between the resident and the corporation would doubtless be maintained in State II. Such being true, the corporation doubtless had the opportunity of determining in a majority of cases whether suit should be maintained in the state or federal courts.

[16] Henderson, op. cit. supra note 7, at c. 5; Cahill, Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within the Territory, 30 Harv. L. Rev. 676 (1917); Scott, Jurisdiction over Non-Residents Doing Business within the State, 32 Harv. L. Rev. 871 (1919).

[17] Bagdon v. Philadelphia & Reading Coal & Iron Co., 217 N.Y. 432, 111 N.E. 1075 (1916).

[18] See, e.g., Mergenthaler Linotype Co. v. Griffin, 226 Ky. 159, 10 S.W. (2d) 633 (1928).

porations doing an interstate business,[19] makes the consent theory inappropriate as a basis for suit against them in the federal courts, unless they have filed actual consent to be sued. If the foreign corporation accompanies its appointment of an agent for service of process with a stipulation that it does not thereby intend to waive its privileges of federal venue, will this stipulation affect the right to bring suit against it in the federal courts? Does the consent to be sued apply to all causes of action or only to those which arose out of business done in the state requiring the appointment?[20] Or can appointment pursuant to state law of an agent for service of process amount to waiver of improper venue in actions of which the federal courts have exclusive jurisdiction?[20a] If the appointment of an agent for service of process is a real consent to be sued in the district, a non-resident individual who has been forced by the state law to appoint an agent within the state for service of process[21] would also be subject to suit in the federal district courts of the state.

The Supreme Court might have reached the same result that it did in the present case by reverting to the theory, adopted formerly by some lower federal courts,[22] that the corporation is a resident of a state in which it does business and appoints an agent for service of process. This theory would have correctly described the fact situation of a foreign corporation doing business within a state. Its adoption might, however, prevent the foreign corporate defendant from removing a case to the federal courts.[23] Moreover, under the residence theory, unlike under the consent theory, a foreign corporation would have the unrestricted right to sue non-residents of the state in which it was doing business in the federal courts of that state.[24]

[19] Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877).

[20] Compare Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907); Simon v. Southern R. Co., 236 U.S. 115 (1915) with Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93 (1917).

[20a] For an enumeration of such actions see 28 U.S.C.A. § 371 (1928).

[21] Cf. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (service upon an ordinary agent where statute did not require designation of an agent).

[22] Zambrino v. Galveston, H. & S.A.R. Co., 38 Fed. 449 (D.C. Tex. 1889); Riddle v. New York, L.E. & W.R. Co., 39 Fed. 290 (C.C. Pa. 1889); Consolidated Store-Service Co. v. Lamson Consolidated Store-Service Co., 41 Fed. 833 (C.C. Mass. 1890); Shainwald v. Davids, 69 Fed. 704 (D.C. Cal. 1895); United States v. Southern Pac. R. Co., 49 Fed. 297 (C.C. Cal. 1892), all overruled by cases cited in note 10 supra.

[23] 38 Stat. 278 (1914), 28 U.S.C.A. § 71 (1927); 3 Moore, Federal Practice § 101.05 (1938).

[24] For elaboration of this point see last sentence of first full paragraph on page 399. This distinction may explain the adoption by the instant case of the "consent" rationale, rather than the "residence" rationale: there has been a widespread movement to remove suits *by* and *against* foreign corporations from the federal courts. See Federal Venue Requirements for Foreign Corporations, 49 Yale L.J. 724, 729 n. 34, 732 n. 46 (1940). The movement, however, was initiated by those who objected to the privileges of foreign corporations to *sue* in the federal courts. Ibid., at 729 n. 34. Such groups would presumably prefer the present decision to one which by adopting the "residence" rationale would permit a foreign corporate plaintiff to found venue in a diversity of citizenship cases on the fact that it was doing business within a given district.